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ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions

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Introduction

The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions

RORY K. LITTLE*

In late 2005, I was asked by the ABA Criminal Justice Standards Committee whether I would serve as “Reporter” to a Task Force that was being formed to consider revisions to the Criminal Justice Standards for Prosecution and Defense Functions.¹ The call did not come out of the blue; I had previously worked with the ABA in various capacities. In the mid-1990s, I had served as a member of the ABA’s Standing Committee on Professional Responsibility.² In 1999, I published an article bemoaning the lack of specific guidance in the ABA Criminal Justice Standards for prosecutors acting in an investigative role.³ That article led to my membership on a Task Force, which ultimately promulgated draft standards addressing “Prosecutorial Investigations,” finally adopted by the ABA in 2008.⁴

* Professor of Law, University of California, Hastings College of the Law. I want to thank Professor Bruce Green for imagining the roundtables project focusing on our draft Prosecution and Defense Function Standards; Susan Hillenbrand for her very helpful comments and her never-ending support at the ABA; U.S. District Judge Jack Tunheim, whose chairmanship of our Task Force was unfailingly patient and steady; and law journal editors Michael Freedman, Meg Keaney, Sara Tosdal, and Jeremy Hessler (all U.C. Hastings class of 2011), whose patience and hard work made Bruce Green’s imagined project, and the two resulting issues of the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* compiling the roundtable articles a reality. They have done Hastings proud!

1. For an account of what a Reporter does, see Rory K. Little, *The Role of Reporter to a Law Project*, 38 HASTINGS CONST. L.Q. 747 (2011) (discussing his role as Reporter in a companion issue to this issue of the *Hastings Law Journal*).

2. See STANDING COMM. ON ETHICS AND PROF’L RESPONSIBILITY, AM. BAR ASS’N, FORMAL AND INFORMAL ETHICS OPINIONS 1983–1998, at v, 462 (2000).

3. Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 738–46 (1999).

4. See generally STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS (2008).

[1111]

Having had a career-long interest in the intersection of legal ethics and criminal law practice, I said yes. I did not know what I was getting into—"The Role of Reporter" is the subject of a companion essay in the *Hastings Constitutional Law Quarterly*.⁵ The project of revising the Criminal Justice Standards for Prosecution and Defense Functions—unrevised since 1991⁶—has been both challenging and professionally absorbing. As the sixteen articles in the companion issues of the *Hastings Law Journal* and the *Hastings Constitutional Law Quarterly* attest,⁷ the range of topics addressed in these two sets of Standards run the gamut of the most important and controversial issues in criminal litigation today. The duration of the ABA's exhaustive development and vetting process—yielding what I hope will be uniformly high-quality Standards that could not be achieved by any single writer, or even a group of drafters—has also surprised me. With any luck, the current process may end with approving votes in the House of Delegates sometime in 2013. Until then, it must be emphasized that the proposed Standards attached as appendices⁸ are simply that—drafts—and are open for comment and revision during at least three more stages.

I. THE DEVELOPMENT AND APPROVAL PROCESS

The ABA is the largest voluntary bar association in the world, with nearly 400,000 members.⁹ As ABA president-elect and president from 1963 to 1965, Lewis F. Powell Jr. oversaw the concept of issuing ABA Criminal Justice Standards to guide criminal litigators, drafted by representative groups including academics; lawyers from federal, state, and local perspectives; prosecutors; defense attorneys, both public defenders and private; and judges.¹⁰ Over the years, the ABA's Standards process has grown to include liaison members from various interested stakeholders, including the U.S. Department of Justice, legal aid organizations, law enforcement groups, and various public and private criminal defense organizations such as the National Association of

5. See Little, *supra* note 1.

6. For an account of the drafting history of these Standards, see STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION intro. at xi–xii (3d ed.1993).

7. See Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093, 1093 (2011).

8. See *infra* Appendix; Little, *supra* note 1, at app.

9. *Membership*, A.B.A., <http://www.americanbar.org/membership.html> (last visited May 23, 2011).

10. See generally Tom C. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOTRE DAME L. REV. 429 (1972); Kenneth J. Hodson, *The American Bar Association Standards for Criminal Justice: Their Development, Evolution and Future*, 59 DEN. L.J. 3 (1981); *id.* at 8 n.14 (noting Justice Powell's involvement specifically); William J. Jameson, *The Beginning: Background and Development of the ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 255 (1974).

Criminal Defense Lawyers. As the current Standards Committee chair, Judge Martin Marcus, has explained, “From the beginning of the project, the Standards have reflected a consensus of the views of representatives of all segments of the criminal justice system.”¹¹ “Balanced representation is the goal.”¹²

This process has worked well over the past four decades, producing twenty-three titles, or sets of Standards, on a multitude of topics important to all aspects of lawyering in the criminal justice system.¹³ Courts at various state and federal levels have relied upon—or at least cited to—various Criminal Justice Standards well over 3200 times.¹⁴ Significantly, in *Strickland v. Washington*, the U.S. Supreme Court noted that the Standards provide reliable guidance as to “prevailing norms of practice” and “guides to determining what is reasonable criminal defense attorney performance.”¹⁵ The Court has relied on the Standards in fashioning and applying constitutional criminal litigation rules at least ten times since.¹⁶ While the Standards have no force of law unless adopted by a court or legislature, their process of development has successfully yielded standards that fairly reflect widely shared professional views.

Importantly, the ABA strives to update its Standards as developments in the law require and as the time and energy of an all-volunteer workforce allow.¹⁷ The first Criminal Justice Standards for Prosecution and Defense Functions were adopted in 1971 and revised for a second edition in 1979; the third editions were adopted in 1991 (Defense) and 1992 (Prosecution).¹⁸

11. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, CRIM. JUST., Winter 2009, at 10, 14.

12. *Id.*

13. See *About Criminal Justice Standards*, A.B.A., http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited May 23, 2011) (listing and linking to all sets of the Criminal Justice Standards).

14. Marcus, *supra* note 11, at 11 (noting 120 citations by the U.S. Supreme Court, 700 citations by federal circuit courts, and over 2400 citations by state supreme courts). These numbers omit state and federal trial level citations and intermediate state appellate court citations. *Id.*

15. 466 U.S. 668, 688 (1984).

16. Marcus, *supra* note 11, at 14 (citing cases).

17. A remarkable fact of the drafting process is that the Task Force, Standards Committee, and Criminal Justice Section Council are all comprised of lawyers and judges who *volunteer* their time to work on Standards. Thus, meetings to draft and revise the Standards generally occur on weekends, at various locations around the country, and consist of Saturday and Sunday working periods of eight or more hours. Only the job of Reporter receives more than reimbursement for travel expenses—and I can assure you that the Reporter is not getting rich on his or her modest stipend.

18. See STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (2d ed. 1980); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (Approved Draft 1971). The third edition of the Standards, commonly referred to as “the Little Red Book” for its bright red cover, publishes the Prosecution and Defense Function Standards together in one volume, along with commentary on the Standards and some drafting history for each. Due to the advent of the

The current revision project began with a Task Force formed in late 2005, chaired by U.S. District Judge John R. Tunheim of the Eastern District of Minnesota. Task Force participants include both voting members and nonvoting—but fully participating—liaison members from various stakeholder organizations. Liaison members have included long-time defense attorneys from Kentucky, Texas, New York and California; state prosecutors from Illinois, Wisconsin, and Wyoming; two law professors; a representative from the U.S. Department of Justice; and yours truly as Reporter. Some of the specific participants changed over the two and a half years of the Task Force, and many had served in more than one criminal justice role during their careers.

In mid-2009, after eleven two-day meetings over thirty-five months, the Task Force delivered its proposed revisions to the Standards Committee. The Task Force draft of the Defense Function Standards is reprinted in the companion volume of the *Hastings Constitutional Law Quarterly*.¹⁹ In 2010, the Standards Committee began its review of the Prosecution Function Standards revisions,²⁰ and in 2011 that Committee began reviewing the Defense Function proposals. Meanwhile, the ABA (spearheaded by the Chair of the Criminal Justice Section, Professor Bruce Green of Fordham University School of Law) organized academic and practitioner roundtable discussions of the drafts as they stood in fall 2010. This *Journal* issue, therefore, presents an unprecedented “snapshot in time” analysis of the Standards still in draft form and quite likely to change before any final ABA adoption.²¹

The ABA’s process of drafting and revision is exhaustive, and can be frustratingly tedious—although the end result is a remarkably careful and thorough review. There are eighty-five separate Standards between the Prosecution (42) and Defense (43) sets, and many have subsections

Internet, the Criminal Justice Section is currently considering how best to promulgate new versions of the Standards. In addition to web publication, should they be published in hardcover at all? Should there be a looseleaf version to permit more frequent updating of individual Standards? Should the web-published versions be updated and annotated continually? Should commentary—drafted by the Reporter after the Standards are adopted and approved by the Criminal Justice Section Council but not the House of Delegates—be included on the Web? The many possible variations and solutions for these and other issues demonstrate, among other things, that the Internet has not always made life simpler.

19. Little, *supra* note 1.

20. The proposed Prosecution Function Standards revisions as they stood in fall 2010 are reprinted as an Appendix to this Introduction. *See infra* Appendix.

21. The decision to allow release and critique of proposed revisions to Standards while still in draft form was not undertaken lightly and not without misgivings. Like law and sausage, perhaps one ought not look too closely at how Standards are made. After deliberation, however, it was decided that the drafting process might benefit from external critiques before final submission to the ABA, and the fascinating content of these two companion issues supports that judgment. It is also true that no human endeavor can be perfect, and the Standards Committee recognizes that while transparency has value, no set of draft Standards will satisfy all observers. In that spirit, the Committee is happy to have the input of the roundtable authors and participants.

addressing separate topics within a single Standard heading.²² Each idea deserves, and receives, separate discussion by members of the drafting and reviewing groups. Thus, the Task Force met for twenty-two days (that is, roughly 140 hours) and also held a few group conference calls. The Task Force went through all of the Standards twice; and as of May 2011, the Standards Committee itself has met for an additional twelve full days over twenty-five months to consider the Task Force's proposed revisions. That committee aspires to complete its work by August 2011. The proposed Standards will then go to the Council of the ABA's Criminal Justice Section for at least two quarterly meetings, and changes are again likely to be made. Finally, once the Council (hopefully) approves, the drafts will be submitted to the ABA's House of Delegates for an adoption vote.²³ Changes can be made in the House as well, and its final review process is likely to take another six months. Thus, final adoption of a fourth edition of the Standards seems unlikely to occur until at least 2013. Many revisions, large and small, can be expected between now and then.

II. DRAFTING GUIDELINES THAT THE TASK FORCE DEVELOPED

In Part III, I present a short list of some significant changes proposed for the fourth edition. But first, I will briefly describe a few general drafting guidelines that the Task Force for which I was Reporter developed over the course of its many meetings.

1. Do Not Change Existing Language or Structure Unless You Have To. Any smart lawyer can rewrite the same idea at least five different ways. When you multiply that by a group of ten-to-fifteen smart lawyers, the rewriting possibilities increase exponentially. However, this is a *revision* project, and much of the current Standards language has been around for a number of decades. The language has become familiar, lawyers have come to imbue certain phrases and Standards with shared meaning, and courts have endorsed any number of the Standards. Thus we concluded that there is a significant "reliance interest" in retaining current Standards' wording, structure, and content. To alter language now without good reason could be interpreted to imply changes in meaning that are not actually intended. "Commentary" and the Reporter's notes cannot always head off such implications. Thus, after a few meetings where we spent hours trying to craft the "perfect" phrase or Standard, only to come back ultimately to the existing language, our

22. For example, the Prosecution Function Standard addressing conflicts of interest has eight separate subsections. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.3 (3d ed. 1993).

23. See Marcus, *supra* note 11, at 14-15.

Task Force adopted a presumption of not changing language unless we felt it to be truly necessary and beneficial.²⁴

2. *Do Not Say Too Much, or Try for Too Much Detail, in a Standard.* Another general guideline has focused on what to put in each “black letter” Standard, versus in the commentary. The concept of commentary is interesting. Commentary is said not to alter or expand the meaning of a Standard but rather to “explain[] and elucidate[].”²⁵ Unlike the Standards themselves, commentary is reviewed only by the Standards Committee prior to publication, and it is written after the Standards themselves have been finally adopted by the House of Delegates.²⁶ It has been said, not entirely jokingly, that commentary is where the ABA “buries” controversies that it cannot resolve with specificity, and where Reporters put arguments they “lost” with the Committees.

However, I think all would agree that the commentary to the Standards can be quite useful in: (1) providing concrete examples of the problem being addressed, or of application of a Standard; (2) noting the outlines of the controversies that a Standard was designed to address or, perhaps, elide; (3) providing legal authorities that can further undergird or explain the Standards’ ideas; and (4) providing some details of application that were seen as inappropriate for the black letter text.

Our Task Force hoped that criminal lawyers—prosecutors and defense—would read and use these Standards to guide decisionmaking and conduct. Thus, we concluded that the “black letter” Standards should not be too long or detailed, or busy lawyers would not read them.²⁷ Often, after struggling for hours over difficult details of application or nuances of language driven by particular hypothetical—as well as real—problems, the ABA groups directed the Reporter to “put it in commentary.” This permitted the process to move forward, the Standards to remain of manageable length, and the Reporter to wrestle with difficult issues at a more leisurely and considered pace. When Chief Justice Marshall wrote that “we must never forget, that it is *a constitution* we are expounding,”²⁸ he meant that the details were not intended to be

24. Of course, whether we successfully abided by that rule in every instance will vary in the eyes of different stakeholders.

25. Marcus, *supra* note 11, at 13.

26. *Id.* at 15.

27. In some instances, the prior Standards process had already produced a fair amount of detail. See, e.g., STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-3.6 (3d ed.1993) (discussing grand jury practice). When presented with great detail in the current Standards, we abided first by the first guideline above. Thus, new ideas added to such detailed Standards can lead to even longer Standards. In the few instances where this is true, the Task Force determined that it was justified by the complexity of the area and the need for “black letter” guidance to the new practitioners who we imagined might be reading the Standards. This question of “likely audience” also bedeviled the Task Force. Suffice it to say that we believe the Standards are directed at least to young lawyers just beginning to practice in criminal cases, as well as to a general readership of lawyers and judges.

28. McCullough v. Maryland, 17 U.S. 316, 407 (1819).

spelled out in the document. While the Standards are hardly of the same stature, the same idea lies behind certain standard-versus-commentary decisions.

3. *Restatement, Best Practices, or Aspirational?* One of the most difficult issues perpetually arising in drafting the Standards is: What is the goal? What is their purpose? Should we be capturing the existing state of the law, or seeking to advance it? Are we writing “ethical rules” or just “best practices” advice? Do we envision our Standards to be stating minimal standards, or aspirational ones that not all will achieve?²⁹

To be frank, I do not think I, or the ABA, have ever finally resolved these questions. Rather, the Standards seem to embody different answers depending on which Standard, or even which subsection, is read. Despite lots of discussion, the Committees on which I have served never came to a comfortable resting place as to a single, uniform vision of what the Standards should embody or how they should be used.³⁰

One thing is clear, and clearly stated: The Standards “are not intended to serve as the basis for the imposition of professional discipline.”³¹ That is, they are not an attempt to impose a minimal regulatory standard that all criminal litigators must achieve and that no lawyer should fail to observe. Neither “are [they] intended to create a standard of care for civil liability or to serve as a predicate” for substantive motions in litigated cases.³² While lawyers and courts may find them to be “valuable measures of the prevailing professional norms”³³ and look to them as “guides to determining what is reasonable,”³⁴ the ABA does not intend or envision its Standards to be used as “clubs” to batter lawyers who, for various and often reasonable reasons, may act differently than a Standard may propose.

It is for this reason that the Standards never use the word “must” but instead consistently state that lawyers “should” do *x* or *y*. Indeed, “should” best captures what I think is the shared vision of Standards drafters. The Standards state norms of conduct, ones we hope are generally applicable and observed, and which “should” be observed absent legitimate cause. In this sense, they are aspirational. They also seek to describe “best practices,” particularly for less experienced lawyers who are seeking guidance regarding specific situations and problems. Our vision is that criminal litigation offices will provide the

29. See generally Ellen Podgor, *The Role of the Prosecution and Defense Function Standards: Stagnant or Progressive?*, 62 HASTINGS L.J. 1159 (2011).

30. See *supra* note 27 (regarding the “bedeviling” question of who is the intended audience for the Standards).

31. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1(b) (Proposed Revisions 2010).

32. *Id.*

33. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

34. *Marcus, supra* note 11, at 13–14; see also *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

Standards to new lawyers, as well as the experienced, and ask them to read and to attempt to follow them. Our hope is that less experienced lawyers will find them useful, and more experienced lawyers will find them both agreeable and refreshing. Our desire is for courts, lawyers, and even legislatures to use the Standards to improve the level of criminal practice,³⁵ so that the community as a whole can further respect and trust in the conduct of lawyers acting in that most important of contexts: criminal cases in which individual liberty is at stake from beginning to end.

III. SOME HIGHLIGHTS OF THE PROPOSED REVISIONS

What follows is a list of what I see as some of the significant revisions proposed by the Task Force and Standards Committee for the Criminal Justice Standards for Prosecution and Defense Functions.

1. We³⁶ have reorganized various Standards within each Function and added or edited the titles of the Standards. This will result in renumbering of the Standards. In this Part, I refer to the new, proposed numbers.

2. We have also proposed a number of new Standards, ten for the Prosecution Function, and fifteen for the Defense Function. For the Prosecution Function, these include:

- “The Prosecutor’s Heightened Duty of Candor”;
- “The Client of the Prosecutor”;
- “The Decision to Seek Detention or Permit Release”;
- “Preservation of Evidence”; and
- “Waiver of Rights as Condition of Plea Agreement.”³⁷

For the Defense Function, new proposed Standards include:

- “Continuing Duties of Defense Counsel”;
- “Right to Counsel at First and Subsequent Judicial Appearances”;
- “Seeking a Detained Client’s Release from Custody”;
- “Comments by Defense Counsel After Verdict or Ruling”;
- “Reassessment of Options After Trial”;
- “Preparing to Appeal”; and
- “Challenges to the Effectiveness of Counsel.”³⁸

35. See Marcus, *supra* note 11, at 11–12 (recounting various state legislative and court rule revisions based on the Criminal Justice Standards).

36. When I say “we” in this Part, I am referring to the joint efforts of the Task Force and the Standards Committee.

37. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-1.3, 3-1.4, 3-5.3, 3-5.6, 3-5.9 (Proposed Revisions 2010).

38. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-1.3, 4-2.2, 4-3.2, 4-7.9, 4-8.2, 4-9.1, 4-9.6 (Proposed Revisions 2009).

3. Recognizing that most criminal cases do not go to trial, a fair amount of additional thought and detail has been devoted to the process and substance of negotiated dispositions. For example:

- We have addressed the controversial issue of waivers of rights as a condition of guilty pleas and have directed that prosecutors should not routinely seek such waivers, and defense counsel should normally oppose them.³⁹
- We have significantly expanded the discussion of plea negotiations and dispositions, going from six to eleven subsections in two Prosecution Function Standards⁴⁰ and from five to thirteen subsections in two Defense Function Standards.⁴¹
- Defining who a “prosecutor” is,⁴² adding the concept of “problem solver” to that definition,⁴³ discussing who the prosecutor’s “client” is,⁴⁴ and discussing the heightened duty of candor that prosecutors may have,⁴⁵ are all additions to the current Standards. Similarly, a definition of “defense counsel”⁴⁶ and discussion of various “continuing duties of defense counsel”⁴⁷ are proposed in the Defense Function.

4. Somewhat surprisingly, there is no discussion of improper biases in the current Standards. But at the very least, the *Batson* line of equal protection decisions would seem to make avoiding improper biases a jury-selecting lawyer’s duty.⁴⁸ We propose parallel provisions to address “Improper Bias Prohibited” generally for both Functions;⁴⁹ the concept also would appear specifically in the “Selection of Jurors” Standards.⁵⁰

5. The concept of attorneys acting within an organizational structure—whether a prosecution office or a public defender’s—is largely undiscussed in the current Standards, although one can find the concept

39. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-5.9 (Proposed Revisions 2010); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-6.4 (Proposed Revisions 2009).

40. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-5.7, 3-5.8 (Proposed Revisions 2010).

41. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-6.2, 4-6.3 (Proposed Revisions 2009).

42. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.1 (Proposed Revisions 2010).

43. *Id.* § 3-1.2.

44. *Id.* § 3-1.3.

45. *Id.* § 3-1.4.

46. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.1(b) (Proposed Revisions 2009).

47. *Id.* § 4-1.3.

48. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (holding that it is unconstitutional to strike potential jurors based on gender); *Batson v. Kentucky*, 476 U.S. 79, 88–89 (1985) (holding that it is unconstitutional for a prosecutor to strike potential jurors based on race); see also *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (same for defense counsel).

49. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.5 (Proposed Revisions 2010); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.4 (Proposed Revisions 2009).

50. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-6.3 (Proposed Revisions 2010); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-7.2 (Proposed Revisions 2009).

in the ABA's generally applicable Model Rules of Professional Conduct.⁵¹ The proposed revisions address this most significantly within the organization of a prosecutor's office,⁵² but also with respect to defense counsel.⁵³

6. The seven specific subsections of the existing Prosecution Function Standard on Investigation⁵⁴ will be replaced with a cross-reference to the new and greatly detailed Standards on Prosecutorial Investigations.⁵⁵

7. A number of small but significant changes are also proposed. For example, we have proposed to recognize expressly that prosecutors and defense attorneys have pro bono service obligations, beyond those intrinsic to their criminal lawyering functions.⁵⁶ And regarding conflicts of interest, the list of close personal relationships that can create a conflict is expanded by adding "sexual partners."⁵⁷

8. Both sets of Standards will now recognize that the lawyer's role does not end with criminal sentencing but requires attention to post-trial motions and issues, and the possibility of appeal. The Defense Function Standards would expressly discuss the role of defense counsel if allegations of ineffective assistance are made, or appear to be warranted.⁵⁸

9. The proposed Prosecution Function Standards seek to resolve an ambiguity in the current Standards: whether a prosecutor must have proof beyond a reasonable doubt, or only probable cause, to charge. Our proposal recognizes that the historic standard of probable cause for charging is not inappropriate, but that it must be bound up with a fair and objective assessment of whether proof beyond a reasonable doubt will ultimately be available and admissible. Thus, proposed Prosecution Function Standard 3-4.4(a) states: "A prosecutor should file criminal charges only if the prosecutor reasonably believes the charges are supported by probable cause and that the admissible evidence will be sufficient to support the conviction beyond reasonable doubt."⁵⁹

51. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.10, 5.1, 5.2 (2010).

52. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-1.9, 3-1.6, 3-2.4 (Proposed Revisions 2010) (maintaining an office manual); *id.* § 3-2.5 (training programs); *id.* § 3-3.1 ("Structure of and Relationships Among Prosecution Offices").

53. E.g., STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-1.7, 4-2.3 (Proposed Revisions 2009); *see also* STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES (3d ed. 1992) (discussing specifically the provision by the government of defense services for indigent clients).

54. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-3.2 to 3-3.3, 3-3.7 to 3-3.11 (3d ed. 1993).

55. See generally STANDARDS FOR CRIMINAL JUSTICE: PROSECUTORIAL INVESTIGATIONS (2008).

56. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-2.1(e) (Proposed Revisions 2010); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.1(a) (Proposed Revisions 2009).

57. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.6(h) (Proposed Revisions 2010); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.5(k) (Proposed Revisions 2009).

58. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-9.6 (Proposed Revisions 2009).

59. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-4.4(a) (Proposed Revisions

Moreover, “[a] prosecutor’s office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.”⁶⁰

CONCLUSION

The foregoing is only a sample of the richness of the Criminal Justice Standards and the current proposals to revise the Criminal Justice Standards for Prosecution and Defense Functions. The articles in this issue and the companion *Hastings Constitutional Law Quarterly* issue provide much further food for thought and demonstrate that even the most careful and wide-ranging drafting process can be supplemented. I think it unlikely that the ABA will ever promulgate proposals that satisfy everyone; indeed, to some extent this will be a mark of the success of the project. For me it has been and continues to be a remarkably fulfilling and educational experience. While there is always room for improvement, this project and the roundtables organized by Criminal Justice Section Chair Bruce Green in the fall of 2010 have undoubtedly furthered our understanding and improved the Standards process overall.

2010).

60. *Id.* § 3-4.4(d)

APPENDIX

ABA STANDARDS FOR CRIMINAL JUSTICE: PROPOSED REVISIONS TO
STANDARDS FOR THE PROSECUTION FUNCTION

(DRAFT AS OF SUMMER 2010)

Standards Committee Chair: Hon. Martin Marcus, N.Y. Supreme Court

Task Force Chair: Hon. John R. Tunheim, US District Judge (D. Minn.)

Reporter: Professor Rory K. Little, U.C. Hastings College of the Law,
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Reporter's Note: What follows is a draft of revised Prosecution Function Standards as they were proposed to be revised as of summer 2010. It is important to note that these are not the ABA's final revisions, and in fact they represent merely the preliminary work of a Task Force. It is certain that many of these standards will be substantially revised from what appears here, before the final (if any) submission of proposed revisions to the ABA's House of Delegates. These proposals do not represent the official views of the ABA or any component of the ABA—they are drafts, published now only for the purpose of public comment and critique.

Also, the following draft does not reprint the current (1993) Standards, but only the Standards as proposed to be revised. The current Prosecution Function Standards can be found on the ABA's website http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_toc.html.

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PART I: GENERAL STANDARDS

Standard 3-1.1 The Scope and Function of These Standards

(a) As used in these standards, “prosecutor” means any attorney, regardless of agency, title, or full or part-time assignment, who investigates or prosecutes criminal cases or who provides legal advice regarding a criminal matter to government lawyers, agents, or offices participating in the investigation or prosecution of criminal cases.

(b) These Standards are intended to provide guidance for the professional conduct and performance of prosecutors, and are not intended to serve as the basis for the imposition of professional discipline, or to create substantive or procedural rights for accused or convicted persons. These Standards are not intended to create a standard of care for civil liability or to serve as a predicate for a motion to suppress or exclude evidence or dismiss a charge.

(c) These Standards are intended to address the performance of prosecutors in all stages of their professional work. Other ABA Criminal Justice Standards should also be consulted for more detailed consideration of the performance of prosecutors in specific areas. For example, the Prosecutorial Investigative standards provide more detail regarding the performance of prosecutors in the investigative stage.

Standard 3-1.2 Functions and Duties of the Prosecutor

(a) The prosecutor is an administrator of justice, an advocate, and an officer of the court. The prosecutor must exercise sound discretion and independence in the performance of his or her functions.

(b) The primary duty of the prosecutor is to seek justice within the bounds of the law. The prosecutor serves the public interest and must act to protect the innocent, convict the guilty, and consider the interests of victims. The prosecutor’s obligation to enforce the law while exercising sound discretion includes honoring the constitutional and legal rights of suspects and defendants.

(c) The prosecutor should know and abide by the standards of professional conduct as expressed in applicable law, ethical codes and opinions, and professional traditions in the prosecutor’s jurisdiction. Prosecutors should avoid an appearance of impropriety in the conduct of their function. A prosecutor should seek out, and the prosecutor’s office should provide, supervisory advice and ethical guidance when the proper course of prosecutorial conduct seems unclear. A prosecutor who disagrees with a governing ethical rule should seek its change if appropriate, and openly challenge it if necessary, but should not knowingly subvert or ignore it.

(d) The prosecutor is not merely a legal advocate for conviction or imprisonment in criminal cases. The prosecutor should be knowledgeable about, and consider, alternatives to prosecution or conviction that may be applicable in individual cases. The prosecutor's office should be available to assist other groups in the law enforcement community and the community at large, in addressing problems that lead to, or result from, criminal activity.

(e) The prosecutor is not merely a case-processor but also a problem-solver responsible for considering broad goals of the criminal justice system, including the reduction of crime and judicious distribution of scarce resources. The prosecutor's office should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should inform appropriate authorities, and support and when appropriate pursue efforts for remedial action.

(f) The prosecutor should make use of ethical guidance offered by existing organizations, and should seek to establish and make use of an advisory council of the kind described in Standard [4-1.5].

[New] Standard 3-1.3 The Prosecutor's Heightened Duty of Candor

(a) In light of the prosecutor's public responsibilities and broad authority and discretion, the prosecutor has a heightened duty of honesty and candor in many situations. When in doubt and no harm to others can be foreseen, the prosecutor should err on the side of candor.

(b) Absent valid investigative confidentiality, or safety and security, concerns, a prosecutor should correct a representation of material fact or law that the prosecutor knows is, or later learns was, false, and should disclose a material fact or facts when necessary to avoid assisting a fraudulent or criminal act or to avoid misleading a judge or factfinder.

(c) If the prosecutor is aware of relevant legal authority in the controlling jurisdiction that is directly adverse to the prosecutor's position and that has not been disclosed, the prosecutor should disclose and fairly describe the authority to the court.

[New] Standard 3-1.4 The Client of the Prosecutor

The prosecutor's client is the public within his or her jurisdiction, and not any particular government agency, law enforcement unit, witness, or victim. The client's interests and views are ordinarily determined through the chief prosecutor within the governmental unit and his or her duly-authorized [prosecutorial] agents.

[New] Standard 3-1.5 Improper Bias Prohibited

(a) A prosecutor should not invidiously discriminate against, or in favor of, any person on the basis of constitutionally or statutorily

impermissible criteria. Such criteria may include factors such as race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status. A prosecutor should not use other improper considerations, such as partisan or improper political or personal considerations, in exercising prosecutorial discretion.

Standard 3-1.6 Conflicts of Interest

(a) A prosecutor should avoid conflicts of interest with respect to his or her official duties, unless a waiver, if permissible, is obtained. The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. A prosecutor should make appropriate disclosures regarding potential conflicts of interest, to supervisors, courts, and to defense counsel when appropriate. When a conflict requiring recusal exists and is either non-waivable or no waiver is in place, the prosecutor should recuse from further participation in the matter and the office should decline to go forward until a non-conflicted prosecutor, or adequate waiver, is in place.

(b) A prosecutor should not represent a defendant in criminal proceedings in the prosecutor's jurisdiction.

(c) A prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the prosecutor's stead in the matter. In that rare instance, the prosecutor should make full disclosures to the defense, other relevant persons, and the courts.

(d) A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client unless the rules of attorney-client confidentiality do not apply or the information has become generally known. [Uncertain whether the following was adopted by the Committee (or whether recusal is the correct answer: A prosecutor who has *Brady* information that cannot be disclosed due to confidentiality rules must recuse from the matter in which that information would be relevant.)]

(e) A prosecutor should not negotiate for private employment with an accused or an attorney or agent for an accused in a matter in which the prosecutor is participating personally and substantially.

(f) A prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in every case.

(g) prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosures to outside persons should be made, and make such disclosures if appropriate.

(h) A prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship or interest with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer, unless the relationship is disclosed to the prosecutor's supervisor and supervisory approval is given, or unless there is no other prosecutor who can be authorized to act in the prosecutor's stead. In the latter rare case, full disclosure should be made to the defense and to the court.

(i) A prosecutor ordinarily should not recommend the services of particular defense counsel to accused persons or witnesses in cases in the prosecutor's office. If requested to make such a recommendation, the prosecutor should consider referring the person generally to the public defender, or to a panel of available criminal defense attorneys, or to the court. In the rare case where a specific recommendation is made by the prosecutor, the recommendation should be to an independent and competent attorney, and the prosecutor should not make a referral that embodies or creates or is likely to create a conflict of interest. A prosecutor should not comment negatively upon the reputation or abilities of any defense counsel to an accused person or witness who is seeking counsel in a case in the prosecutor's office.

(j) A prosecutor should promptly report to a supervisor any but the most obviously frivolous misconduct allegations made against the prosecutor. A prosecutor whose conduct is the subject of an official investigation of a non-frivolous allegation of misconduct should ordinarily recuse from acting as prosecutor in the matter in which the challenged conduct originated. A misconduct allegation alone, however, is not ordinarily a sufficient basis for prosecutorial recusal, absent a judicial or supervisory evaluation that the allegation is serious and warrants serious review. An unfounded or frivolous allegation of misconduct should not deter a prosecutor from fair pursuit of any matter.

Standard 3-I.7 Relationship with the Media

(a) A "public statement" is any extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication or media.

(b) In making public statements, a prosecutor should express respect for the judiciary, for jurors, and support for the criminal justice system so long as it appears to be functioning properly.

(c) A prosecutor should not make or authorize the making of a public statement that the prosecutor reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or unnecessarily heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's or law enforcement actions and which serves a legitimate law enforcement purpose (and subject to any exceptions in an applicable judicial rule or rule of professional conduct).

(d) A prosecutor has duties of confidentiality and loyalty, and should not secretly or anonymously provide non-public information to the media, on or off the record, without authorization from a person or entity that has lawful authority to so authorize.

(e) A prosecutor should not allow prosecutorial judgments to be influenced by potential media contacts or attention.

(f) A prosecutor should exercise reasonable care to prevent investigators, law enforcement personnel, employees, or other persons assisting or associated with the prosecutor from making an extrajudicial statement that the prosecutor would be prohibited from making under this Standard or other applicable rules of professional conduct.

(g) A prosecutor uninvolved in a matter who is commenting as a media source should not ordinarily offer commentary regarding the merits of a specific ongoing criminal prosecution or investigation, although a prosecutor who is uninvolved in a matter may offer generalized media commentary concerning a specific case that serves to educate the public about the criminal justice system and reasonably does not risk prejudicing a specific criminal proceeding. [Move to Commentary?: In rare cases, the interests of justice may permit specific adverse commentary by a prosecutor regarding a criminal matter the prosecutor and the prosecutor's office is not involved in, if authorized and if designed to address clear injustice that appears to be ongoing.]

(h) Absent a legitimate and compelling law enforcement purpose, the prosecutor should not "stage" or assist law enforcement in staging, real or fictional events that address specific cases or investigations solely for the media, nor should the prosecutor invite media presence during investigative actions without careful consideration of the interests of all involved, including suspects, defendants, and the public. However, a prosecutor may reasonably accommodate media requests for access to public information and events.

[New] Standard 3-I.8 Literary or Media Rights Agreements [(from current 3-2.II)]

(a) Prior to the conclusion of a matter in which a prosecutor has been involved, a prosecutor should not enter into any agreement or informal understanding by which the prosecutor acquires an interest in rights to a literary or media portrayal or account based on or arising out of the prosecutor's involvement in the matter.

(b) A prosecutor should not allow the possibility of future personal literary or other media rights or efforts to affect the prosecutor's judgments or actions in any particular matter.

(c) A prosecutor has a lifelong duty of confidentiality regarding his or her professional representations and non-public information gained by virtue of the prosecutor's position or involvement, which must be respected in any contract or work on a literary or media rights project, even if entered into after a matter is concluded.

(d) In creating or participating in any literary or other media account of a matter in which the prosecutor was involved, a prosecutor or former prosecutor should seek consent from the prosecutor's office, and such consent should not be unreasonably withheld. After a reasonable period of time after a prosecutorial matter is concluded, the public's interest in accurate historical accounts of significant events should be presumed to outweigh the public's interest in maintaining confidentiality.

Standard 3-I.9 Duty to Report and Respond to Prosecutorial Misconduct

(a) The prosecutor's office should adopt policies to address allegations of professional misconduct, including violations of law, by prosecutors. At a minimum such policies should require internal reporting of reasonably suspected misconduct to supervisory staff within the office, and authorize supervisory staff to quickly address the allegations. Investigations of internal violations of law normally should be handled in an independent and conflict-free manner, in the same manner as any external allegation of legal violation would be handled.

(b) Where a prosecutor reasonably believes that another person associated with the prosecutor's office is engaged in action, or will act or refuse to act, in a manner that would constitute misconduct, the prosecutor should follow the policies of the prosecutor's office concerning such matters. If such policies are unavailing or do not exist, the prosecutor should attempt, when reasonable, to persuade the person to reconsider the action or inaction, and should refer the matter to higher authority in the prosecutor's office including, if warranted by the seriousness of the matter, to the chief prosecutor.

(c) If, despite the prosecutor's efforts in accordance with sections (a) and (b) above, the chief prosecutor permits, fails to address, or insists upon an action or omission that is clearly a violation of law, the prosecutor may take further remedial action, including revealing information necessary to remedy this violation to appropriate regulatory or government officials not in the prosecutor's office.

[New] Standard 3-1.10 Appropriate Workload [(from current 3-2.9(e))]

(a) A prosecutor should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers the interests of justice in fairness, accuracy, or the speedy disposition of charges, or has a significant potential to lead to the breach of professional obligations.

(b) The prosecutor's office should regularly review the workload of prosecutors, and adjust the workload of individual prosecutors, as well as the intake workload of the entire office if necessary, to ensure the effective and ethical conduct of the prosecution function.

(c) The chief prosecutor for a jurisdiction should inform governmental officials of the workload of the prosecutor's office, and request funding and personnel that are adequate to meet the criminal caseload. The prosecutor consider seeking funding from all appropriate sources, including grant programs from other entities where permitted.

PART II: ORGANIZATION OF THE PROSECUTION FUNCTION

Standard 3-2.1 Prosecution Authority to be Vested in Full-time, Public-Official Attorneys

(a) The prosecution function should be performed by a lawyer who is (i) a public official, (ii) authorized to practice law in the jurisdiction, and (iii) is subject to rules of attorney professional conduct and discipline. Public prosecutors whose professional obligations are devoted exclusively to the prosecution function are preferable to part-time prosecutors who may have other potentially conflicting professional responsibilities.

(b) If a particular case requires the appointment of a special prosecutor from outside the office, adequate funding for this purpose should be made available.

(c) A private attorney who is paid by, or who has an attorney-client relationship with, an individual or entity who is a victim of the charged crime, or has a personal or financial interest in the prosecution of the charges, should not be permitted to serve as prosecutor in that matter.

(d) Unless impractical or unlawful, the prosecutor's office should implement a system for allowing qualified law students, cross-designated

prosecutors from other offices, and private attorneys to learn about and assist with the prosecution function.

(e) Unless prohibited by law, a prosecution office and individual prosecutors should recognize that they have some obligation to provide pro bono service to the community, including involvement by its prosecutors in outside public service and Bar activities, public education, community service activities, and Bar leadership positions. The prosecutor's office should support such activities, and the office's budget should include funding and paid release time for such activities.

Standard 3-2.2 Assuring Excellence and Diversity in the Hiring, Retention, and Compensation of Prosecutors

(a) Strong professional qualifications and performance should be the basis for selection and retention for prosecutorial positions. Effective measures to retain excellent prosecutors should be encouraged, while recognizing the benefits of some turnover. Supervisory prosecutors should select and promote personnel based on merit and expertise, without regard to partisan, personal, or political factors or influence.

(b) The prosecutor's office should also consider the diverse interests and makeup of the community it serves and seek to recruit, hire, promote and retain a similarly diverse group of prosecutors and staff.

(c) The function of public prosecution requires highly developed professional skills and a diversity of backgrounds, talents and experience. The prosecutor's office should promote continuing professional development and continuity of service, and provide prosecutors the opportunity to gain experience in various phases of the prosecution function.

(d) Compensation and benefits for prosecutors and their staffs should be commensurate with the high responsibilities of the office, sufficient to compete with the private sector, and regularly adjusted to attract and retain well-qualified personnel.

Standard 3-2.3 Investigative Resources and Experts

Funds should be available to the prosecutor's office to employ its own staff of professional investigative personnel, forensic experts, and other necessary support personnel, when warranted by the responsibilities of the office; or for the occasional employment of such personnel when necessary in large, complex, or unusual cases. The prosecutor should be provided with funds for the employment of qualified experts as needed for particular cases.

Standard 3-2.4 Office Policies and Procedures

(a) Each prosecutor's office should seek to develop statements of general policies to guide the exercise of prosecutorial discretion and

standard procedures for the office. The objectives of such policies and procedures should be to achieve a fair, efficient, and effective enforcement of the criminal law within the prosecutor's jurisdiction.

(b) In the interest of continuity and clarity, the prosecution office policies and procedures should be memorialized and accessible to relevant staff. The office policies and procedures should be regularly reviewed and revised. The office policies and procedures should be augmented by instruction and training, and are not a substitute for regular training programs.

(c) Prosecution office policies and procedures whose disclosure would not adversely affect the prosecution function should be made available to the public. Not all policies and procedures will be made public, however, and there is no presumption that a policy or procedure will be made public.

(d) The prosecutor's office should have a system in place to regularly verify compliance with office policies. Failure to comply with such office policies and procedures, however, should not ordinarily be grounds for relief or legal attack in any particular matter.

Standard 3-2.5 Training Programs

(a) The prosecutor's office should develop and maintain mandatory programs of training and continuing education for all new and experienced prosecutors and staff. Such programs should include review of, and application exercises regarding, the office's policies and procedures.

(b) In addition to knowledge of substantive legal doctrine and courtroom procedures, a prosecutor's core training curriculum should include: investigation, negotiation, and litigation skills; professional ethics; exercises in the use of prosecutorial discretion; civility and professionalism; appreciation of diversity and elimination of racial and ethnic bias; and technology training. Some training programs might usefully be opened to persons outside the prosecution office.

(c) The prosecutor's office should also make available to its prosecutors, opportunities for training and continuing education outside the office. Adequate funding for continuing training and education, within and outside the office, should be provided.

Standard 3-2.6 Removal or Suspension and Substitution of Chief Prosecutor

(a) Fair and objectively neutral procedures should be established by appropriate legislation, by which the Governor or other public official or body is empowered by law to suspend, or remove, and supersede a chief prosecutor for a jurisdiction and designate a replacement, upon making a public finding, after reasonable notice and hearing, that the prosecutor is

incapable of fulfilling the duties of office due to physical or mental incapacity or for gross deviation from professional norms.

(b) The Governor or other public official or body should be similarly empowered by law to substitute, in a particular case or category of cases, special counsel in the place of the chief prosecutor, by consent or upon making a finding after fair process that this is required due to a serious conflict of interest or a gross deviation from professional norms.

(c) Removal, suspension, or substitution of a prosecutor should not be permitted for improper or irrelevant political reasons.

PART III: PROSECUTORIAL RELATIONSHIPS

Standard 3-3.1 Structure of and Relationships Among Prosecution Offices

(a) The physical extent of a prosecution office's jurisdiction should be sufficient to support at least one full-time prosecutor and necessary support staff. [*Leave in the following, or drop into Commentary?:* Factors to be considered in designing the physical jurisdiction of a prosecutor's office should include population, caseload, geography, and local community standards, and pre-existing political boundaries. [*The Committee suggested that the next sentence be reduced from black letter to Commentary:* In some jurisdictions, conditions and history may make it appropriate to create a unified statewide system of prosecution, in which the state attorney general is the chief prosecutor and district or other local prosecutors are the attorney general's deputies.]

(b) In all States, there should be coordination of the prosecution policies of local prosecution offices to improve the administration and consistency of justice throughout the State. To the extent needed, a central pool of supporting resources, forensic laboratories, and personnel such as investigators, additional prosecutors, accountants and other experts, should be maintained by the state government and should be available to assist all local prosecutors.

(c) Regardless of the statewide structure of prosecution offices, a state-wide association of prosecutors should be established. When questions or issues arise that could create important state-wide precedents, local prosecutors should advise and consult with the attorney general, the state-wide association, and the prosecutors in other local prosecution offices.

(d) A prosecution office should consider having at least one prosecutor who monitors and consults on appellate issues on a state-wide or nationwide basis, and a State should consider having a statewide prosecutor who similarly monitors appellate issues.

(e) Federal, state and local prosecutor's offices should develop practices and procedures that encourage useful coordination with

prosecutors in other jurisdictions, or within the jurisdiction if there is more than one prosecution office within the jurisdiction. Prosecutors should work to identify potential issues of conflict and coordinate with other prosecution offices in advance. [Moving to Commentary (?): If issues of conflict arise between one prosecutor's office and another, the prosecutor should strive to resolve such conflicts amicably and in the public's interest.]

Standard 3-3.2 Relationships with Law Enforcement Personnel

(a) The prosecutor does not normally represent the law enforcement personnel in a criminal case, and law enforcement personnel are not the prosecutor's clients. The prosecutor should maintain respectful yet independent judgment when interacting with law enforcement personnel. When asked by law enforcement personnel, or when legally troublesome practices are observed, the prosecutor should provide independent legal advice about law enforcement actions in specific prosecutions, and about relevant law enforcement practices in general.

(b) The prosecutor should become familiar with and respect the experience and specialized expertise of law enforcement personnel. The prosecutor should promote compliance by law enforcement personnel with applicable legal rules, including rules against improper biases. The prosecutor's office should strive to keep law enforcement personnel informed of relevant legal and legal ethics issues and decisions as they relate to prosecution matters, and to advise law enforcement personnel within the jurisdiction of all relevant prosecution policies.

(c) Representatives of the prosecutor's office should meet and confer regularly with law enforcement agencies, regarding prosecution as well as law enforcement policies. The prosecutor's office should assist in developing and administering training programs for law enforcement personnel regarding the law related to law enforcement activities, and provide time and services of the office's attorneys and staff to aid in such training.

Standard 3-3.3 Relationship with Judges, Defense Counsel, and Others

(a) In the course of professional conduct, a prosecutor should not knowingly make a false statement of fact or law, or knowingly offer false evidence, to a court, lawyer or third party, except for authorized investigative purposes. *[Some Task Force members would prefer to "reasonably believes" to a "knowingly" standard. The Standards Committee did not address this in its first run-through.]*

(b) In all professional contacts with judges, the prosecutor should strive to maintain a proper, professional, and independent relationship,

and avoid appearances of impropriety. A prosecutor should not engage in unauthorized *ex parte* discussions with, or submission of material to, a judge relating to a particular case which is or may come before the judge. With regard to generalized matters requiring judicial discussion (for example, case-management or administrative matters), the prosecutor should invite a representative defense counsel to join in the discussion to the extent practicable.

(c) A prosecutor should strive to develop and maintain courteous and civil working relationships with judges and defense counsel, and should cooperate with them in developing solutions to address ethical, scheduling, or other issues that may arise in particular cases or generally in the criminal justice system.

[New] Standard 3-3.4 When Incriminating Physical Evidence is Disclosed by the Defense

When incriminating physical evidence is delivered to the prosecutor under Defense Function Standard 4-4.8, the prosecutor should not offer the fact of delivery as evidence before a fact-finder for purposes of establishing the culpability of defense counsel's client. However, nothing in this Standard should prevent a prosecutor from offering evidence of the fact of such delivery in response to a foundational objection to the evidence based on chain-of-custody, or in a subsequent proceeding for the purpose of proving a crime or fraud regarding the evidence.

Standard 3-3.5 Relationship with Victims and Witnesses

(a) "Witness" in this Standard encompasses potential and prospective witnesses. The status of a person as "witness" may change, and the prosecutor should regularly reconsider this status.

(b) The prosecutor should be permitted to compensate a nonexpert witness for the reasonable expenses of attendance upon court, attendance for depositions pursuant to statute or court rule, or attendance for pretrial interviews. Payments to a nonexpert witness may also encompass transportation, loss of income, and other reasonable expenses, provided that the payments are disclosed to the defense at an appropriate time.

(c) No other benefits should be provided to nonexpert witnesses unless authorized by law, regulation, accepted practice or supervisory decision. All benefits provided to witnesses should be recorded, so that they may be disclosed to the defense if required by law or court order. A prosecutor should not pay or provide a benefit to a witness in order to, or in an amount that is likely to, affect the substance or truthfulness of the witness's testimony.

(d) A prosecutor should avoid the prospect of having to testify personally about the content of a witness interview, and thus avoid being

the sole witness to a disputed witness interview. Thus a prosecutor should not ordinarily interview, or even be present with, a criminally-implicated witness alone. By contrast, the prosecutor's interview of most routine or government witnesses (for example, custodians of records or law enforcement agents) seldom requires a third-party witness. The prosecutor should be accompanied by another trusted person during the interview of any other witness when the need for corroboration may reasonably be anticipated.

(e) A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. A prosecutor should also consider so advising a witness if the prosecutor reasonably believes the witness may provide self-incriminating information and the witness appears not to know his or her rights. However, a prosecutor should not exaggerate the potential criminal liability of a witness, or so advise a witness, with a purpose, or in a manner likely, to intimidate or influence the truthfulness or completeness of the witness's testimony or to unfairly alter the witness's decision whether to provide information.

(f) The prosecutor should know the law of the jurisdiction regarding the rights of victims and witnesses and should respect those rights.

(g) Subject to the confidentiality that criminal matters sometimes require, unless prohibited by law or court order, the prosecutor should provide victims and witnesses who request it information about the status of cases in which they are involved.

(h) Where practicable, the prosecutor should give an opportunity to victims of serious crimes or their representatives to consult with and to provide information to the prosecutor prior to the decision whether or not to prosecute, to pursue a disposition by plea, or to dismiss the charges.

(i) The prosecutor should seek to ensure that victims of serious crimes or their representatives are given timely notice of: (i) judicial proceedings relating to the victims' case; (ii) anticipated dispositions of the case (iii) sentencing proceedings; and (iv) any decision or action in the case which could result in the defendant's provisional or final release from custody, or change of sentence.

(j) The prosecutor should give witnesses reasonable notice of when their testimony at a proceeding is expected, and should not require witnesses to attend judicial proceedings unless their testimony is reasonably expected at that time, or their presence is required by law. When their attendance is required, the prosecutor should seek to reduce to a minimum the time witnesses must spend at the proceedings. The prosecutor should ensure that witnesses are given notice as soon as practicable of scheduling changes which will affect the witnesses' required attendance at judicial proceedings.

(k) The prosecutor should seek to ensure that victims and witnesses who may need protections against intimidation or retaliation are advised of and afforded protections where feasible.

(l) The prosecutor should not engage in any inappropriate personal relationship with any victim or witness.

Standard 3-3.6 Relationship with Expert Witnesses

(a) For purposes of this standard, an expert witness is a person who may or will offer expert and non-percipient advice, opinions, or testimony on behalf of the prosecution. The prosecutor should know the different disclosure and other rules governing experts who are engaged not as testifying witnesses but for consultation only. A prosecutor should evaluate all expert advice, opinion, or testimony independently, and not simply accept the opinion of a government or other expert based on affiliation or prominence alone.

(b) The prosecutor may engage an expert for consultation on evidence and strategy, or an expert to prepare a report to be presented through the expert's testimony. Before engaging an expert, the prosecutor should investigate the expert's credentials, relevant professional experience, and reputation in the field. Before offering an expert as a witness, the prosecutor should investigate the scientific acceptance of the particular theory, method, or conclusions about which the expert would testify.

(c) A prosecutor who engages an expert to provide a testimonial opinion should respect the independence of the expert and should not seek to dictate the substance of the expert's opinion on the relevant subject.

(d) The prosecutor should examine a testifying the expert's background and credentials for potential impeachment issues, and should seek to learn enough about the substantive area of the expert's expertise, including ethical rules applicable in the expert's field, to enable effective preparation of the expert, as well as cross-examination of any defense expert on the relevant topic. The prosecutor should explain to the expert that the expert's role in the proceeding will be as an impartial witness called to aid the fact-finders, explain the manner in which the examination of the expert is likely to be conducted, and suggest likely impeachment questions the expert may be asked.

(e) The prosecutor should not pay any fee or provide a benefit for the purpose of influencing an expert's testimony. The prosecutor should not fix the amount of the fee contingent upon the expert's testimony or the result in the case. Nor should the prosecutor promise or imply the prospect of future work for the expert based on the expert's testimony.

(f) The prosecutor should provide the expert with all information reasonably necessary to support a full and fair opinion. The prosecutor

should be aware, and explain to the expert, that all communications with, and documents shared with, a testifying expert may be subject to disclosure to opposing counsel. The prosecutor should be aware of expert discovery rules and act to protect confidentiality and the public's interests, for example by not sharing with the expert confidences and work product that counsel does not want disclosed.

(g) The prosecutor should timely disclose to the defense all evidence or information learned from an expert that tends to negate the guilt of the accused or mitigate the offense, even if the prosecutor does not intend to call the expert as a witness.

PART IV: INVESTIGATION AND DECISIONS TO CHARGE, NOT CHARGE, OR DISMISS

Standard 3-4 Investigative Function of the Prosecutor

When performing an investigative function, prosecutors should be familiar with and follow the ABA Standards on Prosecutorial Investigations.

Standard 3-4.2 Decisions to Charge

(a) While the decision to arrest is often the responsibility of non-prosecutors, the decision to institute formal criminal proceedings should be the responsibility of the prosecutor alone. Where the law permits a citizen or law enforcement officer to initiate proceedings by complaining directly to a judicial officer or the grand jury, the complainant should be required to present the complaint for prior review by the prosecutor when feasible, and the prosecutor's recommendation regarding the complaint should be communicated to the judicial officer or grand jury.

(b) The prosecutor's office should establish standards and procedures for evaluating complaints to determine whether criminal proceedings should be instituted. [Should the following really come out? Move to another Standard?: A prosecutor should never charge a person merely to meet the dictates of a quota or other workload management measure.](c) In determining whether charges should be filed, prosecutors should consider whether further investigation [such as arrest, interrogation, and searches?] should be undertaken prior to or upon the filing of criminal charges. After charges are filed the prosecutor should continue to oversee law enforcement investigative activity.

(d) If the defendant is not in custody when charged, the prosecutor should consider whether a voluntary appearance rather than a custodial arrest would suffice to protect the public and ensure the defendant's presence at court proceedings. [*"A custodial arrest is not necessary in every case."*]

Standard 3-4.3 Relationship with Grand Jury

(a) In presenting a matter to a grand jury, and in light of its *ex parte* character, the prosecutor should respect the independence of the grand jury, and should not preempt a function of the grand jury, mislead the grand jury, or abuse the processes of the grand jury.

(b) Where the prosecutor is authorized to act as a legal advisor to the grand jury, the prosecutor should appropriately explain the law and may, if permitted by law, express an opinion on the legal significance of the evidence, but should give due deference to the grand jury as an independent legal body.

(c) The prosecutor should not make statement or arguments to a grand jury in an effort to influence grand jury action in a manner that would be impermissible in a trial.

(d) The entirety of the proceedings occurring before a grand jury, including the prosecutor's communications with and presentations and instructions to the grand jury, should be recorded in some manner, and preserved. The prosecutor should avoid off-the-record communications with the grand jury, or with individual grand jurors.

Standard 3-4.4 Quality and Scope of Evidence Before the Grand Jury

(a) A prosecutor should not seek an indictment unless the prosecutor reasonably believes the charges are supported by probable cause and that there will be admissible evidence sufficient to support the charge(s) beyond reasonable doubt at trial. A prosecutor should advise the grand jury that it should not indict if the prosecutor believes the evidence presented does not warrant an indictment.

(b) A prosecutor should only present evidence to the grand jury which the prosecutor believes is appropriate and authorized under law for presentation to the grand jury. The prosecutor may present witnesses to summarize relevant evidence where the law of the jurisdiction permits.

(c) When a new grand jury is empanelled, a prosecutor should ensure that the grand jurors are appropriately instructed, consistent with the law of the jurisdiction, on the grand jury's right and ability to seek evidence, ask questions, and hear directly from any available witnesses, including eyewitnesses.

(d) A prosecutor with personal knowledge of non-frivolous evidence that directly negates the guilt of a subject of the investigation should present or otherwise disclose that evidence to the grand jury. The prosecutor should relay to the grand jury any non-frivolous request by the subject or target of an investigation to present other evidence claimed to be exculpatory.

(e) If the prosecutor concludes that a witness is a target of a criminal investigation, the prosecutor should not seek to compel the witness's

testimony before the grand jury absent immunity. However, the prosecutor should honor a reasonable request from a target or subject who wishes to testify before the grand jury.

(f) Unless there is a reasonable possibility it will facilitate flight of the target, endanger other persons, interfere with an ongoing investigation, or obstruct justice, the prosecutor should give notice to a target of a grand jury investigation, and offer the target an opportunity to testify without immunity before the grand jury. Prior to taking a target's testimony, the prosecutor should advise the target of the privilege against self-incrimination and obtain a waiver of that right.

(g) [Reconsider? If the prosecutor DOES intend to judicially challenge, can the prosecutor then call the witness? Seems unclear as written.]: The prosecutor should not compel the appearance of a witness whose activities are the subject of the grand jury's inquiry, if the witness states in advance that if called the witness will exercise the constitutional privilege not to testify, unless the prosecutor intends to judicially challenge the exercise of the privilege or to seek a grant of immunity according to the law.

(h) The prosecutor should not issue a grand jury subpoena to a criminal defense attorney or staff member, or other witness whose testimony could reasonably be protected by a recognized privilege, without considering the applicable law and rules of professional responsibility in the jurisdiction governing such action.

(i) Except where permitted by the law of the jurisdiction, a prosecutor should not use the grand jury in order to obtain evidence to assist the prosecution in preparation for trial of a defendant who has already been charged, although a prosecutor may use the grand jury to investigate additional or new charges against a defendant who has already been charged.

(j) Except where permitted by the law of the jurisdiction, a prosecutor should not use a criminal grand jury solely or primarily for the purpose of aiding or assisting in an administrative or civil inquiry.

[New] Standard 3-4.5 Minimum Requirements for Filing and Maintaining Criminal Charges

(a) A prosecutor should file criminal charges only if the prosecutor reasonably believes the charges are supported by probable cause and that the admissible evidence will be sufficient to support conviction beyond reasonable doubt.

(b) After criminal charges are filed, a prosecutor should maintain them only if the prosecutor reasonably believes that probable cause continues to exist and that the admissible evidence will be sufficient to support conviction beyond reasonable doubt.

(c) If a prosecutor has significant doubt about the guilt of the accused or the quality, truthfulness, or sufficiency of the evidence in any criminal case assigned to the prosecutor, the prosecutor should disclose those doubts to supervisory staff. The prosecutor's office should then determine whether it is appropriate to proceed with the case. An individual prosecutor should not be compelled to participate in a prosecution if the individual prosecutor has significant doubt about the guilt of the accused.

(d) A prosecutor's office should not file or maintain charges if it believes the defendant is innocent, no matter what the state of the evidence.

[New] Standard 3-4.6 Discretion in Filing and Maintaining Criminal Charges

The prosecutor serves the public interest and must act to protect the innocent as well as to convict the guilty, and also consider the interests of victims. The prosecutor's obligation to enforce the law while exercising sound discretion includes honoring the constitutional and legal rights of suspects, defendants, and victims. (a) The prosecutor has an obligation to enforce the law and seek justice through the exercise of sound discretion. Accordingly, the prosecutor is not obliged to file or maintain all criminal charges which the evidence might support. Among the factors which the prosecutor may properly consider in exercising discretion to initiate, decline, or dismiss a criminal charge, even though it meets the minimal requirements of Standard 3-4.4, are:

- (i) the strength of the case;
- (ii) the prosecutor's [reasonable] doubt that the accused is in fact guilty;
- (iii) the extent or absence of harm caused by the offense;
- (iv) the impact of prosecution or non-prosecution on the public welfare;
- (iii) the background and characteristics of the offender;
- (iv) whether the authorized or likely punishment or collateral consequences are disproportionate in relation to the particular offense or the offender;
- (v) the views and motives of the victim or complainant;
- (vi) reluctance of the witnesses to testify;
- (vii) improper conduct by law enforcement;
- (viii) unwarranted disparate treatment of similarly situated persons;
- (ix) potential collateral impact on third-parties, including witnesses or victims;
- (x) cooperation of the offender in the apprehension or conviction of others;
- (xi) changes in law or policy;

- (xii) the fair and efficient distribution of limited prosecutorial resources; and
- (xiii) the likelihood of prosecution by another jurisdiction;
- (xiv) whether society's interest in the matter might be appropriately vindicated by available civil, regulatory, administrative, or private remedies.

(b) In exercising discretion to file and maintain charges, the prosecutor should not consider:

- (i) partisan or other improper political or personal considerations;
- (ii) hostility or personal animus towards a potential subject, or any other improper motive of the prosecutor; or
- (iii) the race, ethnicity, religion, gender, sexual orientation, political beliefs or affiliations, age or social or economic status of the potential subject or victim, unless they are elements of the crime or are relevant to the motive of the perpetrator. [or? and?] "should not invidiously discriminate against, or in favor of, any person on the basis of constitutionally or statutorily impermissible criteria. Such criteria may include factors such as race, ethnicity, religion, gender, sexual orientation, political beliefs, age, or social or economic status."

(c) A prosecutor may file and maintain charges even if juries in the jurisdiction have tended to acquit persons accused of the particular kind of criminal act in question.

(d) The prosecutor should not file or maintain charges greater in number or degree than can reasonably be supported with evidence at trial and that are necessary to fairly reflect the gravity of the offense or deter similar conduct.

(e) A prosecutor may condition a dismissal of charges, *nolle prosequi*, or similar action on the accused's relinquishment of a right to seek civil redress, only if the accused has agreed to the action knowingly, intelligently and voluntarily, and such waiver is disclosed to the court. A prosecutor should not use a civil waiver to avoid a bona fide claim of improper law enforcement, and a decision not to file criminal charges should be made on its merits and not for the purpose of obtaining a civil waiver.

(f) The prosecutor should always consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The nature of some offenses and offenders may warrant noncriminal disposition, for example in the case of first offenders or cooperating witnesses.

(g) The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.

**PART V: PRETRIAL ACTIVITIES, PLEA AGREEMENTS,
AND POST-CHARGE DISPOSITIONS**

**Standard 3-5.1 Prompt Investigation, Litigation, and Disposition
of Criminal Charges**

(a) A prosecutor should seek to diligently and promptly investigate, litigate, and dispose of criminal charges, consistent with the interests of justice and with due regard for fairness, accuracy, and the legal rights of the defendant. The prosecutor's office should be organized and supported with adequate staff and facilities to enable it to process and resolve criminal charges with due speed.

(b) A prosecutor should not misrepresent facts or otherwise mislead the court when stating reasons for seeking delay, and should use procedural devices that will cause delay only when there is a legitimate basis for such use, and not to secure an unfair tactical advantage or personal benefit.

(c) The prosecutor should not unreasonably oppose requests for continuances from defense counsel.

(d) A prosecutor should be punctual in attendance in court, in the submission of motions, briefs, and other papers, and in relations with opposing counsel, witnesses and victims. The prosecutor should emphasize to all witnesses the importance of punctuality in court attendance.

**Standard 3-5.2 Role in First Appearance and Preliminary
Hearing**

(a) A prosecutor should be present at any first appearance of the accused, as well as any preliminary hearing.

(b) At or before the first appearance (however denominated) of an accused before a judicial officer, the prosecutor should consider:

(i) whether the accused has counsel, and if not, whether counsel will be made available or waived;

(ii) whether the accused appears to be mentally competent, and if not, whether to seek an evaluation;

(iii) whether the accused should be detained pending further proceedings or released, and if so, whether supervisory conditions should be imposed; and

(iv) whether further proceedings should be scheduled to move the matter toward timely resolution.

(c) The prosecutor handling the first appearance should ensure that the charges are consistent with the conduct described in the police reports or with other information the prosecutor possesses.

(d) If the accused does not yet have counsel and has not waived counsel, the prosecutor should ask the court not to engage in substantive

proceedings other than a decision to release the accused, and the prosecutor should not seek to obtain waiver of other important pretrial rights such as the right to a preliminary hearing.

(e) The prosecutor should not communicate directly with an accused unless a waiver of counsel has been entered or the accused's counsel consents. If the accused does not have counsel, the prosecutor should make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel, and is given reasonable opportunity to obtain counsel.

(f) If the prosecutor believes pretrial release is appropriate, or it is ordered, the prosecutor should cooperate in arrangements for release under the prevailing pretrial release system.

(g) If the prosecutor has reasonable concerns about the accused's mental competence, the prosecutor should bring those concerns to the attention of defense counsel and, if necessary, the judicial officer.

(h) The prosecutor should not seek to delay a prompt judicial determination of probable cause for the criminal charges without good cause, particularly if the accused is in custody.

[New] Standard 3-5.3 The Decision to Seek Detention or Permit Release

(a) The prosecutor should favor pretrial release, unless detention is necessary to protect the community or individuals from harm or to ensure the return of the defendant for future proceedings.

(b) The prosecutor's decisions to recommend pretrial release or detention should ordinarily be based on the facts and circumstances of each defendant, rather than made categorically. The prosecutor should consider information relevant to these decisions from all sources, including the defendant.

(c) The prosecutor should cooperate with pretrial services or other personnel who review or assemble information to be provided to the court regarding pretrial release determinations.

(d) The prosecutor should be open to reconsideration of pretrial detention or release decisions based on changed circumstances, including a lengthy period of detention.

[New] Standard 3-5.4 Preparation for Court Proceedings, Recording and Transmitting Information

(a) The prosecutor's office should be provided sufficient resources and be organized to permit adequate preparation for court proceedings.

(b) A prosecutor should ordinarily prepare in advance for court proceedings. Adequate preparation depends on the nature of the proceeding, and will often include: reviewing available documents; considering what issues are likely to arise and the prosecution's position,

how best to present the issues, and what solutions might be offered; relevant legal research and factual investigation; and contacting other persons who might be of assistance in addressing the anticipated issues.

(c) A prosecutor who appears at any court proceeding for another prosecutor who is assigned to the case should make reasonable efforts to be adequately informed about the case and issues likely to come up at the proceeding and to prepare as necessary.

(d) A prosecutor handling any court appearance should document what happens at the proceeding, so that necessary information will be available to prosecutors who handle the case in the future.

(e) A prosecutor should take steps to ensure that any court order issued to the prosecution is transmitted to persons necessary to effectuate the order.

Standard 3-5.5 Identification and Disclosure of Information and Evidence

(a) A prosecutor should promptly seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government's witnesses or evidence, or reduce the likely punishment of the accused if convicted.

(b) The prosecutor should also promptly advise other governmental agencies involved in the case of their continuing duty to identify, preserve, and disclose to the prosecutor information described in (a) above.

(c) Before trial of a criminal case, a prosecutor should make timely disclosure to the defense of information described in (a) above that is known to the prosecutor, regardless of whether the prosecutor believes it is likely to change the result of the proceeding. Regarding discovery prior to a guilty plea, see Standard 3-5.8 below. The obligations to identify and disclose such information continue throughout the prosecution of a criminal case.

(d) A prosecutor should promptly respond to, and make a diligent effort to comply with, legally proper discovery requests. The prosecutor should ordinarily provide specific responses to individualized defense requests for specific information, not just an acknowledgement of the prosecutor's general discovery obligations.

(e) The prosecutor should also make prompt efforts to identify and disclose to the defense any [relevant?] physical evidence that has been gathered in the investigation, and provide the defense a reasonable opportunity to examine it.

(f) A prosecutor should not avoid pursuit of information or evidence because the prosecutor believes it will damage the prosecution's case or aid the accused. A prosecutor should not

intentionally attempt to obscure information identified pursuant to (a) above by disclosing it as part of a large volume of materials.

(g) A prosecutor should determine whether additional statutes, rules or caselaw may govern or restrict the disclosure of information, and comply with them absent court order.

[New] Standard 3-5.6 Preservation of Information and Evidence

(a) Materials that the prosecutor should make reasonable efforts to preserve, and direct their agents to preserve, include

- (i) evidence relevant to the investigation and prosecution, whether or not admitted at trial;
- (ii) information identified pursuant to 3-5.6(a); and
- (iii) other materials that are necessary to support the decisions on.

(b) Decisions regarding the method and duration of preservation of such materials should consider the character and seriousness of the case, the character of the particular evidence or information, the likelihood of further challenges to the judgment following conviction, and the resources available for preservation. Materials should ordinarily be preserved until a criminal case is final on appeal or the time to appeal has expired. [In felony cases?,] if post-conviction collateral litigation is reasonably anticipated, such materials should ordinarily be preserved until that litigation is concluded or time-limits have expired. In death penalty cases, such information should be preserved until the penalty is carried out or is precluded.

(c) The prosecutor should comply with additional statutes, rules or caselaw that may govern the preservation of evidence. DNA evidence should be preserved as described in ABA Criminal Justice Standard 16-2.6

Standard 3-5.7 Plea Discussions and Agreements

(a) The prosecutor should remain open to discussions with defense counsel concerning disposition of charges by guilty plea or other negotiated disposition. A prosecutor should not engage in plea discussions directly with a represented defendant, except with defense counsel's approval. Where a defendant has properly waived counsel, the prosecutor may engage in plea discussions with the defendant, and should make and preserve a record of such discussions.

(b) The prosecutor should not enter into a plea agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a plea agreement. The prosecutor should not be influenced in plea discussions by inappropriate factors such as those listed in Standard 3-4.5(b) above.

(c) The prosecutor should not set unreasonably short deadlines, or conditions for a plea that are so coercive that voluntariness of the plea or effectiveness of defense counsel is put into question. A prosecutor may, however, set a reasonable deadline before trial or hearing for acceptance of a plea offer.

(d) The prosecutor's duty of candor (Section 3-1.3 above) applies in plea discussions. A prosecutor should not knowingly make false statements or misrepresentations of fact or law in the course of plea discussions.

(e) Prior to entering into a plea agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed plea agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.

(f) A prosecutor should not routinely require waivers of the disclosures in (e) above, but may on an individualized basis seek and accept a knowing and voluntary waiver. Before accepting a guilty plea, however, the prosecutor should always disclose evidence known to the prosecutor that directly suggests the defendant is innocent. A prosecutor may not accept a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt is lacking.

Standard 3-5.8 Establishing and Fulfilling Conditions of Negotiated Dispositions

(a) A prosecutor should not demand terms in a negotiated disposition (such as a plea agreement or deferred prosecution or diversion agreement) that are unlawful or in violation of public policy. The prosecutor should ensure that all promises and conditions that are part of the agreement are memorialized.

(b) The prosecutor may properly promise the defense that the prosecutor will or will not take a particular position concerning sentence and conditions. However, the prosecutor should not imply a greater power to influence the disposition of a case than is actually possessed.

(c) Once an agreement is final and accepted by the court, the prosecutor should comply with, and make good faith efforts to have carried out, the government's obligations in the agreement. The prosecutor should construe agreement conditions and evaluate performance, including any cooperation, in a good-faith and reasonable manner.

(d) If the prosecutor believes that a defendant has breached an agreement accepted by the court, the prosecutor should notify the defense regarding the prosecutor's belief and any intended adverse action. If the defense presents a good-faith disagreement and the parties

cannot quickly resolve it, the prosecutor ordinarily should not act before judicial resolution.

(e) If the prosecutor reasonably believes that the court is acting inconsistently with any term of a plea agreement, the prosecutor should raise the matter with the court.

[New] Standard 3-5.9 Waiver of Rights as Condition of Plea Agreement

(a) A prosecutor should not condition a plea agreement on a waiver of the right to appeal the length of a sentence which exceeds a range anticipated or a term specified in the agreement.

(b) A prosecutor should not routinely require plea waivers of post-conviction claims of ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unknown to the defendant at the time of the guilty plea. The prosecutor may seek and accept such waivers on an individualized basis if knowing and voluntary. No waiver should be accepted without an exception for manifest injustice including actual innocence based on newly discovered evidence.

(c) A prosecutor should not condition a plea agreement on a waiver of the right to file a habeas corpus or other comparable post-conviction petition.

(d) A plea agreement should not waive a defendant's right to file for any appropriate form of judicial relief where manifest injustice can be shown. A prosecutor should not request or rely on waivers to hide an injustice or material flaw in the case which is undisclosed to the defense.

(e) A waiver of appeal of sentence should be binding on both the defendant and the prosecution.

Standard 3-5.10 Record of Reasons for Dismissal of Charges

When criminal charges are dismissed on the prosecution's motion (including by plea of *nolle prosequi* or its equivalent), the prosecutor ordinarily should make and retain an appropriate record of the reasons for the dismissal and indicate whether the dismissal was with or without prejudice.

PART VI: COURT HEARINGS AND TRIAL

Standard 3-6.1 Calendar Control

Control over the scheduling of court hearings and trials should be vested in the court rather than the parties. When the prosecutor is aware of facts that would affect scheduling, the prosecutor should advise the court and defense counsel.

Standard 3-6.2 Courtroom Professionalism and Civility

(a) As an officer of the court, the prosecutor should support the authority of the court and the dignity of the courtroom by adherence to codes of professionalism and civility, and by manifesting a professional and courteous attitude toward the judge, opposing counsel, witnesses, defendants, jurors, court staff, and others. In court as elsewhere, the prosecutor should not display or act out of any improper or unlawful bias.

(b) When court is in session, the prosecutor should address the court, not opposing counsel or the defendant, except with permission of the court.

(c) A prosecutor should comply promptly and civilly with a court's orders, but if the prosecutor considers an order to be significantly erroneous or prejudicial, the prosecutor should ensure that the record adequately reflects the events and has a right to make respectful objections and reasonable requests for reconsideration, and to seek other relief as the law permits.

(d) Prosecutors should cooperate with courts and organized bar associations in developing codes of professionalism and civility, and should abide by such codes that apply in their jurisdiction

Standard 3-6.3 Selection of Jurors

(a) A prosecutor should not strike jurors based on constitutionally or statutorily impermissible criteria, and should object if defense counsel appears to do so.

(b) The prosecutor's office should be aware of legal standards that govern the selection of jurors, and train prosecutors to comply. The prosecutor's office should also be aware of the process used to select and summon the jury pool and bring legal deficiencies to the attention of the court.

(c) The prosecutor should prepare, to effectively discharge the prosecution function in the selection of the jury, including the exercise of challenges for cause and peremptory challenges.

(d) In those cases where it appears necessary to conduct a pretrial investigation of potential jurors' backgrounds, the investigative methods used should not harass, intimidate, or unduly embarrass potential jurors, nor invade their privacy, and should ordinarily be restricted to investigation of records and sources of information already in existence.

(e) The prosecutor's questions in voir dire should be used only to obtain information relevant to challenges. A prosecutor should not seek to commit jurors on factual issues likely to arise in the case, or to influence their view of evidence or arguments that will later be heard at

trial, or to suggest facts or arguments that the prosecutor reasonably should know would be barred at trial.

(f) The prosecutor should seek to minimize any undue embarrassment or invasion of privacy of potential jurors, for example seeking to inquire into sensitive matters only at the bench or in chambers, while still enabling fair and efficient juror selection.

(g) If the court does not permit voir dire by counsel, the prosecutor should provide the court with suggested questions in advance, and request specific follow-up questions during the selection process when necessary to ensure fair juror selection.

(h) If the prosecutor has reliable information that conflicts with a potential juror's responses, or that reasonably would support a "for cause" challenge by any party, the prosecutor should inform the court, and unless the court otherwise permits, should inform defense counsel.

Standard 3-6.4 Relationship with Jurors

(a) A prosecutor should not communicate with persons the prosecutor knows to be summoned for jury duty or impaneled as jurors prior to or during trial, other than in the lawful conduct of courtroom proceedings. The prosecutor should seek to avoid even the appearance of improper communications by avoiding contacts with jurors.

(b) The prosecutor should treat jurors with courtesy and respect, while avoiding a show of undue solicitude for their comfort or convenience.

(c) After discharge of a juror, a prosecutor should avoid contacts that may harass or unnecessarily embarrass the juror, or that criticize the jury's actions or verdict or express views that could otherwise adversely influence the juror's future jury service.

(d) The prosecutor may, if no statute, rule, or order prohibits such action, communicate with jurors to investigate whether a verdict may be subject to legal challenge, or to evaluate the prosecution's performance for improvements in the future.

Standard 3-6.5 Opening Statement at Trial

(a) The prosecutor's opening at trial should be a fair statement of the case from the prosecutor's perspective, and should incorporate a discussion of the factual issues and the evidence that will be offered to support the prosecutor's theory of the case.

(b) The prosecutor's opening statement should be made without argument, expressing personal opinions, vouching for witnesses, inappropriate appeals to emotion or personal attacks on opposing counsel.

(c) If the prosecutor believes a portion of the opening statement may reasonably be objected to, the prosecutor should resolve the issue in advance, with defense counsel or the court.

Standard 3-6.6 Presentation of Evidence

(a) The prosecutor should present admissible evidence that proves the guilt of the defendant beyond reasonable doubt.

(b) A prosecutor should not offer evidence that the prosecutor knows to be false or misleading, whether by documents, tangible evidence, or the testimony of witnesses.

(c) During the presentation of the evidence, the prosecutor should challenge perceived misconduct by opposing counsel, a witness, or the court, by appealing to the court or through other appropriate avenues, not by engaging in conduct the prosecutor knows to be improper.

(d) During the trial, if the prosecutor discovers that false evidence or testimony has been introduced by the prosecution, the prosecutor should take reasonable remedial steps. If the witness is still on the stand, the prosecutor should attempt to correct the error through further examination. If the falsity remains uncorrected or is not discovered until the witness is off the stand, the prosecutor should notify the court and opposing counsel for the determination of an appropriate remedy.

(e) A prosecutor should not bring to the attention of the trier of fact matters the prosecutor reasonably believes to be inadmissible, whether by offering or displaying inadmissible evidence, asking legally objectionable questions, or making impermissible comments or arguments.

(f) If the prosecutor believes evidence the prosecutor intends to offer may reasonably be objected to, the prosecutor should attempt to resolve the issue in advance, with defense counsel or the court.

(g) The prosecutor should not display tangible evidence until it is admitted into evidence, except insofar as its display is necessarily incidental to its tender, although the prosecutor may seek permission to display admissible evidence during opening statement. The prosecutor should avoid displaying admitted evidence in a manner that is unduly prejudicial.

Standard 3-6.7 Examination of Witnesses in Court

(a) The prosecutor should conduct the examination of witnesses fairly and with due regard for the dignity and legitimate privacy of the witness, and without seeking to intimidate or humiliate the witness unnecessarily.

(b) The prosecutor should not use cross-examination to discredit or undermine a witness's testimony, if the prosecutor knows the testimony to be truthful.

(c) The prosecutor should not call a witness to testify in the presence of the jury when the prosecutor knows the witness will claim a valid privilege not to testify.

(d) The prosecutor should not ask questions that imply the existence of a factual predicate without a good faith belief in its existence.

Standard 3-6.8 Closing Arguments to the Trier of Fact

(a) The prosecutor's closing should present arguments and a fair summary of the evidence that proves the defendant guilty beyond reasonable doubt.

(b) The prosecutor may argue all reasonable inferences from evidence in the record, unless the prosecutor knows an inference to be false. The prosecutor should review the evidence in the record to the extent time permits before delivering the closing, and should not knowingly misstate the evidence.

(c) The prosecutor should not imply special or secret knowledge of the truth or witness credibility, or express the prosecutor's personal opinion as such. The prosecutor may, however, state that the evidence demonstrates that the defendant is guilty and that the evidence shows that witnesses testified accurately.

(d) The prosecutor should not make arguments that appeal to improper biases or extreme emotion, or that contain ad hominem disparagement.. The prosecutor should make only those arguments that are consistent with the trier's duty to decide the case on the evidence, and should not seek to divert the trier from that duty.

(e) When the prosecutor makes a rebuttal argument, the prosecutor should only respond to issues raised in the defense argument, and not present or raise new issues. If the prosecutor believes that a defense argument was improper, the prosecutor should seek relief from the court, rather than respond with improper argument.

Standard 3-6.9 Facts Outside the Record

In any court hearing, the prosecutor should not knowingly refer to, or argue on the basis of, facts outside the record, unless such facts are matters of common public knowledge based on ordinary human experience, or are matters of which the court may take judicial notice, or are facts the prosecutor reasonably believes will be entered into the record at that proceeding.

Standard 3-6.10 Comments by Prosecutor After Verdict or Ruling

(a) The prosecutor should respectfully accept acquittals. Regarding other adverse rulings (including the rare acquittal by a judge that is appealable), while the prosecutor may express respectful disagreement

and an intention to pursue lawful options for review, the prosecutor should refrain from public criticism of any participant.

(b) The prosecutor may publicly praise a jury verdict or court ruling, compliment government agents or others who aided in the matter, and note the social value of the ruling or event, but should refrain from inappropriate boasting.

PART VII: POST-TRIAL MOTIONS AND SENTENCING

[New] Standard 3-7.1 Post-trial Motions

The prosecutor should conduct a fair evaluation of post-trial motions, determine their merit, and respond accordingly. The prosecutor should not oppose motions that the prosecutor believes are correct, or solely for the purpose of preserving a conviction.

Standard 3-7.2 Role in Sentencing [Task Force Proposal:]

(a) Before or soon after charges are filed, the prosecutor should evaluate likely sentencing options, in order to effectively negotiate regarding the charges pretrial, and to be effectively prepared once sentencing proceedings become necessary.

(b) The prosecutor should not make the severity of sentences, or the number of convictions, an index of a prosecutor's effectiveness.

(c) Prosecutors should know the relevant sentencing laws and rules, and be prepared to play an active role in advising the court in sentencing. The prosecutor should seek to assure that a fair and informed sentencing judgment is made, and to avoid unfair sentences as well as unfair sentencing disparities. In the interests of uniformity, the prosecution office should develop consistent policies for evaluating and making sentencing recommendations, and not leave complete discretion for sentencing policy to individual prosecutors. The prosecutor should cooperate fully with the court's probation officers and act to provide the court with full and accurate information relevant to sentencing issues.

(d) The prosecutor should be fully informed about, and comply with the law governing relevant sentencing options as well as collateral consequences and remedies, such as forfeiture, restitution, and immigration consequences.

(e) The prosecutor should be fully informed about, and comply with, relevant laws regarding victims' rights, including rules permitting victims to participate in the sentencing process. The prosecutor should seek to facilitate victims participating in the sentencing process as the law permits.

(f) At any sentencing proceeding, the prosecutor should be afforded the opportunity to address the sentencing authority and to offer a sentencing recommendation. [Members were divided on whether to

make the following commentary, or black letter: Where sentence is fixed by the jury, the prosecutor should present evidence on the issue within the limits permitted in the jurisdiction, but the prosecutor should avoid introducing evidence bearing solely on sentence which would improperly prejudice the jury's determination of the issue of guilt.]

Standard 3-7.3 Information Relevant to Sentencing [Task Force Proposal:]

(a) The prosecutor should assist the court in securing complete and accurate information for use in sentencing. The prosecutor should disclose to the court any information it has that is relevant to sentencing. If material incompleteness or inaccuracy in a presentence report comes to the prosecutor's attention, the prosecutor should take steps to present the complete and correct information to the court and defense counsel.

(b) The prosecutor should disclose to the defense and to the court at or prior to the sentencing proceeding all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order from the court.

(c) During the presentence investigation process, the prosecutor should disclose to the defense, prior to sentencing, any evidence or information it provides to the court or presentence investigator in aid of sentencing, unless contrary to law or rule in the jurisdiction, or a protective order has been sought.

[**Note:** Relevant to (c) above, at its 2008 Annual Meeting, the ABA adopted the following resolution:

RESOLVED, That the American Bar Association recommends that Rule 32 of the Federal Rules of Criminal Procedure be amended to require that:

(a) any party submitting documentary information to the probation officer in connection with a pre-sentence investigation shall, unless excused by the Court for good cause shown, provide that documentary information to the opposing party at the same time it is submitted to the probation officer;

(b) a probation officer who receives oral information from a party other than through the interview of the defendant, unless excused by the Court for good cause shown, provide a written summary of the information to the parties.

(c) a probation officer who receives documentary information from a non-party in connection with a pre-sentence investigation, unless excused by the Court for good cause shown, promptly provide that documentary information to the parties; and

(d) a probation officer who receives oral information from a non-party, unless excused by the Court for a good cause shown, provide a written summary of the information to the parties.]

PART VIII: APPEALS [NEW]**[New] Standard 3-8.1 General Principles for Prosecutors Handling Appeals [Task Force Proposal:]**

(a) The prosecutor's office should encourage one or more prosecutors in the office to develop knowledge and expertise regarding the appellate law and process within the jurisdiction, and develop contacts with other office's prosecutors who have such expertise. Larger offices should consider having one or more prosecutors devoted entirely to appeals

(b) Any prosecutor handling an appeal should become familiar and seek to comply with the law, rules, and practices that govern the appellate process.

(c) When an adverse court ruling materially affects the prosecution's case, the prosecutor should evaluate whether an appeal, possibly interlocutory, is authorized by law and, if so, whether it is in the best interests of justice to pursue such an appeal, taking into consideration the benefits to the prosecution but also the costs of appellate process and delay to the defendant, victims and witnesses.

(d) The appellate prosecutor should exercise independent judgment in reviewing the record and the defense arguments and evidence relevant to an appeal. An appellate prosecutor who was not counsel in the trial court should consult with the trial prosecutor to the extent feasible. When defense appellate issues have merit, the prosecutor should respond in the best interests of justice, and not oppose meritorious defense arguments merely to preserve a conviction.

(e) The appellate prosecutor should be sensitive to appellate issues that are common or recurring and should seek to develop consistent, fair, and defensible positions regarding such issues in the appellate court. The appellate prosecutor should be mindful of the precedential effect that appellate rulings may have, within the prosecutor's jurisdiction and more generally.

(f) Prior to any appellate oral argument, a prosecutor should do at least one "moot court" to practice, develop, and polish the prosecutor's appellate presentation.

[Possible prosecutorial standards for collateral proceedings are left to the new ABA Task Force on Collateral Proceedings.]
